88-1887

Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

WILLIAM N. HUTCHINSON, JR., Esq.,

Petitioner,

vs.

McDONALD'S CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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55 pp

QUESTION PRESENTED

WHETHER A UNITED STATES DISTRICT COURT MAY IMPOSE SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11, AS AMENDED, FOR CONDUCT THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT?

PARTIES TO PROCEEDINGS BELOW

This action began as a complaint filed by plaintiff, ROBERT BAKER, against defendants, McDONALD'S CORPORATION, ROBERT WISEMULLER, JEAN ACIERNO and FRED COLLINS. Petitioner, WILLIAM N. HUTCHINSON, JR., Esq. was the attorney for the plaintiff, ROBERT BAKER.

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NO.

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WILLIAM N. HUTCHINSON, JR., Esq.,

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OPINION BELOW

The Order Granting Motion for Sanctions in Part by the United States District Court for the Southern District of Florida, Paine, J., is reported at 686 F.Supp 1485 (S.D. Fla 1987). A related Order Granting Motion for Summary Judgment, Findings of Fact and Conclusions of Law is reported at 686 F.Supp. 1474 (S.D. Fla. 1987). The opinion of the Court of Appeals for the Eleventh Circuit was not published. The order of the Eleventh Circuit Court of Appeals on the Petitioner's Petition for Rehearing in Banc was not published. All of the opinions are reprinted in the Appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on December 21, 1988. A petition for rehearing was filed January 19, 1989, which petition was denied February 21, 1989.

The jurisdiction of this Court is invoked under Title 28 U.S.C. s. 1254 (1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Prior to the amendment, Rule 11 provided:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

As amended, effective August 1, 1983, Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument or the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses, incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This is a case of an attorney whose conduct in signing an employment discrimination complaint April 25, 1983 the trial court found to violate the proscriptions of Federal Rule of Civil

Procedure 11 as it was amended effective August 1, 1983. The trial judge additionally expressed anger at the lawyer's refusal to dismiss the pleadings as discovery developed what trial court considered to be the baselessness of the complaint. For both the pre-amendment signing and the later refusal to file a dismissal, the trial court punished the lawyer by the imposition of fees. The United States Court of Appeals for the Eleventh Circuit affirmed the trial court. The petitioner raised for the first time on rehearing the issue of whether fundamental error had been committed by applying post-amendment standards and penalties to pre-amendment conduct, as well as by using Rule 11 to punish a lawyer for not dropping a complaint he had previously signed. The appeals court amended its decision to eliminate a reference to a party's inability to file an action directly under the Thirteenth Amendment, but stated that there was no factual basis for any such action in the case at bar. In all other respects, the appellate court allowed its affirmance to remain in force.

REASONS FOR GRANTING CERTIORARI

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH TWO OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS SANCTIONED A DEPARTURE BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, REQUIRING EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The pleadings that petitioner WILLIAM N. HUTCHINSON, JR., Esq. signed April 25, 1983 may not pass muster under Rule 11 of the Federal Rules of Civil Procedure as it was amended effective August 1, 1983. That is not the issue, however. Rather, the issue is whether HUTCHINSON should be punished for violating on April 25 a rule of court that was not effective until more than three months later.

As even the United States Court of Appeals for the Eleventh Circuit has noted, Federal Rule of Civil Procedure 11 was amended effective August 1, 1983 to provide for an objective standard by which pleadings were to be judged for purposes of sanction. *Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581, 1583, n. 2 (11th Cir. 1986). Although *Hashemi* was the affirmance of a trial court's refusal to impose post-amendment sanctions for pre-amendment conduct, even the Eleventh Circuit appeared to state in that opinion that such a retroactive application of the "new" Rule 11 would be improper.

> Hashemi filed his action against EIR in September, 1980. The action was dismissed in June 1983. Rule 11 was amended in 1983. We find no persuasive reason for applying the 1983 Rule 11 standard to Hashemi's 1980 action; therefore, we hold that the district court did not err in applying the "bad faith" standard to EIR's Rule 11 motion for sanctions.

784 F.2d at 1584.

The *Hashemi* court further noted in its discussion that the appellant in that case had "fail[ed] to cite any authority for its proposition that this court should apply the amended rule without regard to when the underlying action was originally filed."

The United States Court of Appeals for the Seventh Circuit, meanwhile, citing to *Hashemi*, has held directly that the amended Rule 11 could not be a basis for sanctioning pre-amendment conduct. *Pantry Queen Foods, Inc. v. Lifshultz Fast Freight, Inc.*, 809 F.2d 451 (7th Cir. 1987) (trial court imposed

sanctions but did not refer to any statute or rule as authority).

> Because the amended Rule 11 did not go into force until August 1, however, it does not apply. The Supreme Court's order promulgating the 1983 amendments states that they "shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending." This is sufficient ground to apply the new Rule 11 to any filing after August 1 in a pending case. It does not, however, support the application of the Rule to prior filings.

809 F.2d at 454.

Likewise citing *Hashemi*, the United States Court of Appeals for the Sixth Circuit has affirmed a trial court's denial of sanctions and has stated that it perceived of no reason to apply amended Rule 11 standards to pleadings, motions and other papers filed prior to effective date of amendment. *Smith v. Detroit Federation of Teachers, Local 231, American Federation of Teachers, AFL-CIO*, 829 F.2d 1370, 1380 (6th Cir. 1987).

Thus, the Eleventh Circuit in the instant case has not only held contrary to its own prior dicta in *Hashemi*, but has held contrary to the decisions of two other circuits.

The about-face of the Eleventh Circuit casts in clear relief the unreasonableness of both the trial court's order and its own affirmance of that order. While this petition does not seek to argue the merits of the original pleading filed against Respondent, it is clear that whatever sins may have been committed were consummated prior to the effective date of the amendment to Rule 11 under which the trial court seeks to punish Petitioner. Such a departure from the accepted and usual course of judicial proceedings requires this Court's intervention and exercise of its powers of supervision.

Another abuse of the discretion of the courts below in the case at bar was the trial court's effectuation of its clear

intent to use Rule 11 to punish the petitioner for conduct that Rule 11 does not forbid -- i.e., for refusing to drop a complaint after the trial judge felt that the petitioner should have realized it was frivolous.

> We also note one aggravating factor: During the course of Delores Baker's Deposition, when it was pointed out to plaintiff's counsel that there was absolutely no factual basis for any claim asserted under the Fourteenth Amendment or pursuant to 42 U.S.C. s. 1983, counsel for the defendant requested plaintiff's attorney to voluntarily dismiss those claims so that the defendant would not be required to litigate them further. Counsel for plaintiff refused. See, Attachment to D.E. 64.
>
> We do not mean to imply that an attorney should bow to threats made by opposing counsel. On the other hand, if it wasn't apparent to Mr. Hutchinson at the inception of this suit that a claim based on the Fourteenth Amendment and/or s. 1983 was not legally cognizable under the facts of this case, it certainly should have been at the time Mrs. Baker's deposition was taken. . . .

686 F.Supp. at 1487, Appendix at 2-4. While to have dismissed portions of the complaint, or perhaps even all of it, may appear in hindsight to have been reasonable, such a tack is not commanded by Rule 11. For the amended Rule 11 deals only with the initial signing of a "pleading, motion, or other paper" and has been held specifically by two other circuits not to impose any continuing duty upon counsel.

> Rule 11 applies only to the initial signing of a "pleading, motion, or other paper". Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule. Entitled "Signing of Pleadings, Motions, and Other Papers; Sanctions", the rule refers repeatedly to

> the signing of papers; its central feature is the certification established by the signature.
>
> In addition, when rule 11 was amended in 1983 to make sanctions mandatory, the rule was also amended to include the words "motion or other paper" each time after the word "pleading" was used. Thus, amended rule 11 applies to every paper signed during the course of the proceedings and not only to the pleadings. While the drafters of the rule could easily have further extended its application by referring to the entire conduct of the proceeding, they failed to do so and instead chose to expand only the categories of papers to which the rule applies.

Oliveri v. Thompson, 803 F.2d 1265, 1274 (2nd Cir. 1986). See also, *Pantry Queen*, 809 F.2d at 454 ("Rule 11 does not require the updating of papers that were not subject to sanctions when filed"); *Cf. Donaldson v. Clark*, 819 F.2d 1551, 1563 (11th Cir. 1987) (en banc) (Johnson, J., concurring specially) ("[T]he court must determine whether, at the time the complaint or motion was filed, the attorney believed after objectively reasonable inquiry that the complaint or motion was well grounded in fact").

The trial court used Rule 11 to sanction petitioner for something Rule 11 does not forbid. That was plain error. For the court of appeals to have upheld the trial court on that point puts the Eleventh Circuit in conflict with the Second and Seventh Circuits. The trial court's conduct, as well as the appellate court's sanctioning of it, represents a departure from the accepted and usual course of judicial proceedings. Both factors justify this court's grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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May, 1989

Appendix

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ROBERT J. BAKER, Plaintiff

v.

McDONALD'S CORPORATION, Defendant

No. 83-6313-Civ.

United States District Court,
S. D. Florida.

December 4, 1987

William N. Hutchinson, Jr.,
Fort Lauderdale, Fla., for plaintiff

Jeffrey McClellan
Atlanta, Ga., for defendant

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PAINE, District Judge.

This cause is before the Court upon the defendant McDONALD'S CORPORATION'S (hereafter referred to as McDONALD'S)[1] motion for summary judgment pursuant to *Federal Rule of Civil Procedure* 56. The only response to this motion made on behalf of the plaintiff is an unfiled, undocketed, affidavit, dated June 4, 1984, which is located on the left-hand side of the Court file (Volume II) (i.e., separate from the pleadings and documents which are an official part of

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1 McDONALDS is the only remaining defendant in this action, as all other defendants were dismissed pursuant to court order (D.E. 59) for the plaintiff's failure to timely serve them.

the court record).[2] No memorandum in opposition to the motion for summary judgment (D.E. 25) was filed by plaintiff's counsel.[3]

The plaintiff brought this action against McDONALD'S and several individual employees of McDONALD'S alleging violations of the Thirteenth and Fourteenth Amendments to the U.S. Constitution, and violations of 42 U.S.C. Sections 1981, 1983[4], 1985 and 2000e. Specifically, the plaintiff claims that he was the victim of racial and sex discrimination; he seeks declaratory and injunctive relief, as well as damages.

After a review of the record before us, including the plaintiff's deposition (consisting of three (3) volumes), affidavits submitted by the defendant, relevant pleadings and memoranda, and plaintiff's unfiled affidavit, we find that there is no genuine issue of material fact which remains to be decided and that the defendant is entitled to judgment as a matter of law. In accordance therewith, we make the following findings of fact and conclusions of law.

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[2] In our order dated February 7, 1986 (D.E. 58) we noted that this affidavit had been "filed". Such was not the case. There is nothing to indicate who placed this affidavit in the court file, or when it was placed in the court file. We further note that every document received by this office is stamped with the word "received" and the date. Likewise, in the Clerk's office, documents received by mail or hand-delivered are either "filed" (i.e., the word "filed", the date, the time and the place of filing are all stamped on the document) or stamped "received", with the date. No such stamps appear on the affidavit in the file.

[3] The plaintiff requested an extension of time to file a response to the motion for summary judgment (D.E. 33). This request was granted and the plaintiff was allowed until May 30, 1984 to file his response (D.E. 37). No response was ever filed.

[4] Plaintiff states during his deposition that the inclusion of Section 1983 in the complaint was a typographical error [Plaintiff's deposition, Volume II, p.33]. However, no amendment to the complaint, or other formal notice that its inclusion was in error, was ever filed. Moreover, certain allegations in plaintiff's unfiled affidavit (para. 15 and para. 16) show an intent to pursue a Section 1983 claim, since those allegations have no relevance whatsoever except in connection with a Section 1983 claim.

Findings of Fact

The plaintiff is a black male. He was initially hired by McDONALD'S CORP. on August 1, 1976 as a manager trainee [Plaintiff's Deposition, Volume I, p.76 (D.E. 56)]. He was assigned to work at one of the company's Ft. Lauderdale stores. After three weeks, he was promoted to second assistant manager [Plaintiff's deposition, Volume I, p.83]. Thereafter, plaintiff's advancement was rapid -- the plaintiff admits that he progressed upwards through the company ranks at a faster-than-normal pace [Plaintiff's deposition; Volume I, p. 96].[5]

In approximately February, 1981, plaintiff became an area supervisor [Plaintiff's deposition; Volume I, p.110]. As area supervisor, plaintiff was responsible for the overall supervision of four to five stores in Broward and/or Dade Counties [Plaintiff's deposition, Volume I, p. 111].

As part of his work responsibilities, plaintiff was required to evaluate the store managers at each store within his jurisdiction, as well as help resolve personnel problems within each store [Plaintiff's deposition, Volume I; pp. 111-112; pp.197-201].[6] In addition, plaintiff understood that his duties included the prevention and elimination of racial and sex discrimination within the workplace [Plaintiff's deposition, Volume II; pp. 50-54].

As part of his training, Baker received instruction in

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[5] For a detailed description of plaintiff's employment progress, see Plaintiff's deposition, Volume I; pp. 87-89, 91, 94, 97-99, and 105-110.

[6] Plaintiff testified that he made an annual performance review of each manager on a specified point scale -- i.e. from 1 to 5, 5 being (the lowest evaluation. Upon being asked what the lowest evaluation he ever gave was, he replied that it was a 3, to Joe Kopezza [Plaintiff's deposition, Volume I; pp. 195-196, 198, 200]. He did make one evaluation in 1982 to Maria Sakelos, however, he did not remember what evaluation he had given her [pp. 197-198] and stated that he never told her what her evaluation had been.

personnel, labor and human relations [Plaintiff's deposition, Volume I; pp. 113-116]. In late 1981, sexual harassment was discussed in one of these courses. At one point during a group discussion, it was stated that merely touching a female employee could be interpreted as sexual harassment [Plaintiff's deposition, Volume I; p. 116].[7]

During plaintiff's employment, McDONALD'S maintained the following policy:

Non-Discrimination at McDonald's

> It is McDonald's policy to treat employees and applicants for employment fairly and without regard to race, color, sex, religion, national origin, age or handicap. This policy applies to all employment practices including recruiting, hiring, pay rates, promotions, and other terms and conditions of employment and terminations. McDonald's also prohibits any form of harassment, joking remarks or other abusive conduct directed at employees because of their race, color, sex, religion, national origin, or handicap. Any employee who feels subjected to such behavior should immediately report it to their supervisor, their supervisor's supervisor, or Personnel Manager. Such reports will be investigated thoroughly. If the report has merit, disciplinary action will be taken against the offender. Depending on the severity of the misconduct, the disciplinary action could range

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[7] Plaintiff states that Larry Zimmerman, the regional supervisor at that time, made the following comments about a Mr. Fred Collins, who was Plaintiff's supervisor:

> "[He said] that McDonald's sexual harassment was becoming more and more evident, and he used Fred Collins in the group; that Fred's a toucher, and that could be interpreted as a sexual harassment."

Plaintiff's deposition, Volume I; p. 116].

from a warning to termination.

[D.E. 25; Attachment to Affidavit of Jamie Measey].

Although plaintiff claims that he had never seen a copy of the written policy statement [Plaintiff's deposition, Volume I; pp. 117-118], he had some "common sense" understanding of what would constitute unacceptable behavior [Plaintiff's deposition, Volume I; 122-124, 149; Volume II; pp. 50-54]. For instance, on at least one occasion, Baker reprimanded several male employees for making alleged suggestive remarks to a female employee [Plaintiff's deposition, Volume I; pp. 123-124].

In March, 1982, two female employees who were under Baker's supervision complained to Jamie Measey, the assistant Personnel Manager, that the plaintiff had made sexual advances toward them [D.E. 25; Affidavit of Jamie Measey]. The affidavits of those employees, attached to the motion for summary judgment, describe attempts by the plaintiff to establish an intimate relationship with each woman.

Beverly Froeba, a swing manager under plaintiff's supervision, relates an incident which occurred in March, 1982. After making repeated remarks over a period of months to Mrs. Froeba that he wished to "get together" with her,[8] Baker approached Mrs. Froeba and invited her out for a drink. Mrs. Froeba accepted after Baker told her that two other employees would be joining them. She and Baker went to a restaurant, where Baker again repeated his remark that he wished to "get together" with her. He added that "his wife didn't always give him everything he wanted and that sometimes he wanted something different." [D.E. 25; Attachment 2]. When the other employees did not appear, Mrs. Froeba requested that they

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[8] Of course, we recognize that the words "get together" could also imply a less intimate relationship. However, the additional remarks allegedly made by Baker, as well as the circumstances under which they were made, make it clear that Baker was speaking of a sexual relationship. Evidently, that is the way Mrs. Froeba understood it, and, even viewing these facts in the light most favorable to the plaintiff, such statements can not be reasonably construed any other way.

leave the restaurant, and they did so.

Jean Acierno, a store manager under Baker's supervision, states that Baker had invited her out for drinks frequently. One evening in February, 1982, Baker called her on the telephone, at home, insisting that he needed to see her about an urgent matter. In the face of his insistence, she finally capitulated, and stated that since she could not leave her children alone, he should come to her house.

Upon arrival, Baker stated his business -- to Ms. Acierno, his "urgent" matter seemed somewhat trivial. Ms. Acierno states that, once the matter had been discussed and disposed of, Baker began talking about his marital problems. He informed Ms. Acierno that he dated other women and then said "Jean, I want you." Ms. Acierno replied that he could not have her, at which point Baker urged Ms. Acierno to have sex with him. Ms. Acierno states that Baker twice attempted to touch her in an intimate manner. Eventually, he left [D.E. 25; Attachment 3].

These incidents were reported to Robert Weissmuller, the regional supervisor. On April 5th, Terry Lovelace (the operations manager and plaintiff's immediate supervisor) met the plaintiff by arrangement at the regional office and informed him that Mr. Weissmuller wished to speak with him later that day [Plaintiff's deposition, Volume I; p.16O]. The plaintiff was informed then that there were charges of sexual harassment made against him [Plaintiff's deposition, Volume I; p. 160]. Baker and Lovelace spent approximately 45 minutes together, discussing the Jean Acierno incident [Plaintiff's deposition, Volume I; pp. 161-163].[9] When Baker talked with Jamie

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[9] Essentially, the plaintiff admits that the incidents regarding Ms. Acierno and Mrs. Froeba occurred, but, in each case, it was the woman who was the aggressor, not him. Plaintiff's version is that these women wanted to have sex with him, but he declined the invitations.

Our decision to grant summary judgment does not rest on whether the incidents of sexual harassment described by these witnesses are true or not. The standard here is not whether these incidents occurred, but whether McDONALD's could reasonably believe that they had occurred. See, Conclusions

Measey that same day, he was told that there were actually four or five complaints of sexual harassment against him. [Plaintiff's deposition, Volume I; p. 164].

At approximately 5:30 PM, Baker met with Mr. Weissmuller. After asking Baker whether he knew of the complaints against him, Weissmuller informed Baker that an investigation of the charges would be made [Plaintiff's deposition, Volume I; p. 166]. Two days later, plaintiff was told to stay out of his stores pending the conclusion of the investigation [Plaintiff's deposition, Volume I; 158]. Apparently, he was given leave with pay [Plaintiff's deposition, Volume I; p. 144].

An investigator for McDONALD'S interviewed several employees who were working or had worked with Baker, in addition to Beverly Froeba and Jean Acierno [D.E. 25; Attachment 4].[10] These employees stated the following: Two female employees stated that Baker frequently made joking remarks to them, asking when they could go to bed together (Baker admits to telling jokes involving sex in the presence of female employees [Plaintiff's Deposition, Volume I; pp. 105-108, 224]). Mr. Baker's former supervisor, Harry Coaxum (a black male - *See*, Plaintiff's deposition, Volume II, p. 186) received a complaint from a black female employee named "Alice" (Plaintiff's deposition. Volume II; p.185] that the plaintiff had rubbed his sexual organs against her. He states

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of Law, infra, at p. 18. Thus, the disputed factual accounts of these incidents will not preclude summary judgment.

[10] Although this entire investigative report is hearsay, and in some cases, hearsay within hearsay, no objection to its inclusion with defendant's motion for summary judgment was made. Since only admissible evidence may be considered on a motion for summary judgment, we will not consider those out of court statements included in the report for the truth of the matters asserted. We may, however, consider that report in connection with the knowledge of the defendant McDONALD's; i.e., whether the report supports McDONALD's reasons for firing the plaintiff. We may also consider that report as proof that McDONALD's did, in fact, conduct an investigation of the charge against the plaintiff.

that he took no disciplinary action against Baker, as Baker had denied that the incident occurred. Mr. Coaxum does state that he warned the plaintiff that sexual harassment could result in termination [D.E. 25; Attachment 5]. Preshell Mills, a black female, states that Bob Baker told her at a conference in St. Petersberg that the only way to get ahead at McDONALD'S was to go to bed with her superiors. She states that, at the time, Baker had much more experience than she did as a store manager and that she understood his comments to mean that she should go to bed with him [D.E. 25; Attachment 6].

At the conclusion of this investigation, the plaintiff was called into Mr. Wisemuller's office again (on April 20th). He was told at that time that he was terminated from employment at McDONALD'S.

Conclusions of Law

This Court has subject matter jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1343, and personal jurisdiction over plaintiff and defendant McDONALD'S. The three individual defendants have been dismissed for plaintiff's failure to timely serve them.

The plaintiff alleges claims pursuant to 42 U.S.C. Sections 1981, 1983, 1985(3) and 2000e for employment discrimination, as well as claims brought directly under the Thirteenth and Fourteenth Amendments. The plaintiff also alleges common law claims for slander and defamation. We will discuss each claim separately.

In order to prevail on a motion for summary judgment, the movant must demonstrate that there remains no genuine issue of material fact which remains to be decided, and that he/she/it is entitled to judgment as a matter of law. *Federal Rules of Civil Procedure, Rule* 56(c). Once the moving party has supported their motion for summary judgment, the burden shifts to the party opposing the motion to come forward with significant probative evidence demonstrating that a triable issue of fact does exist. *American Viking Contractors, Inc. v. Scribner Equipment Company*, 745 F.2d 1365 (11th Cir. 1984).

Moreover, if, after the completion of discovery, there is a complete failure of proof with regard to an essential element of the plaintiff's claim, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

After a review of all of the pleadings, memoranda, affidavits and depositions in the court file, it appears that there is no genuine issue of material fact which remains to be decided. Those undisputed facts are set forth, supra. Based on those facts, it appears that the defendant is entitled to judgment as a matter of law, as discussed below.

42 U.S.C. Section 1983

The plaintiff admits that defendant McDONALD'S is a private corporation [Plaintiff's deposition, Volume III; pp. 184-185]. At the very least, no evidence has been submitted by the plaintiff to show that this defendant is anything but a private corporation. An essential element of a claim brought pursuant to Section 1983 is that the alleged wrong was committed by a person (or entity) acting under color of or pursuant to the law of a state. There has been a complete failure of proof as to this essential element of plaintiff's claim, and, therefore, summary judgment should be granted.

42 U.S.C. Section 1985(c)

The plaintiff attempts to recover under this section for an alleged conspiracy among the defendant corporation and several of its agents, supervisors and employees. The object of this alleged conspiracy was to deprive the plaintiff of rights guaranteed under the 13th and 14th Amendments, and to deprive him of rights guaranteed by 42 U.S.C. Sections 1981 and 2000e. In order to prevail on this claim, the plaintiff would have to prove each of the following elements:

(1) The existence of a conspiracy;
(2) For the purpose of depriving, either directly or indirectly, any person or class of persons, of the equal protection of the laws or of the equal privileges and

immunities under the laws;
(3) Some act in furtherance of the conspiracy; and
(4) That the plaintiff was injured in person or property or deprived of having or exercising any right or privilege of a citizen of the United States.

Griffin v. Breckinridge, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798-1799 29 L.Ed.2d 338 (1971).

This claim fails as a matter of law for several reasons. First, with regard to the first element enumerated above, the plaintiff has failed to prove the existence of a conspiracy.

A corporation is an amorphous entity having no substance except in law. It can only act through its officers, agents and employees. A conspiracy requires the combination of two or more persons -- i.e., the meeting of two independent minds intent on one fell purpose. Since the collective "minds" of a corporation's officers, agents, and employees constitute the single "mind" of the corporation, corporate officers, agents and employees, while acting within their scope of employment, are incapable as a matter of law of conspiring among themselves or with the corporation. *See, Cross v. General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir. 1983), *cert. denied*, 466 U.S. 980, 104 S.Ct. 2364, 80 L.Ed.2d 836 (1984); *Herrman v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 679 (1978); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). *See, also, Givan v. Greyhoundlines Inc.*, 616 F.Supp. 1223 (S.D. Ohio 1985); *Weaver v. Gross*, 605 F.Supp. 210 (D.C.D.C. 1985); *Nation v. Winn-Dixie Stores, Inc.*, 567 F.Supp. 997, *reaffirmed*, 570 F.Supp. 1473 (N.D. Ga. 1983); and Klausner v. Southern Oil Co. of New York, Inc., 533 F.Supp. 1335 (N.D.N.Y. 1982). *Contra, Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235, 1256-59 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979).[11] To hold otherwise would be

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[11] At least one of our sister courts in this district have followed the rule in Novotny. See, Jacobs v. Board of Regents, 473 F.Supp. 663, 670 (S.D. Fla. 1979) (Gonzalez, J.). The more recent trend, however, has been to disallow claims which are based on an alleged conspiracy among corporate employees or

tantamount to saying that a person or entity may be liable for conspiring with themselves.

Second, the plaintiff has failed to show, as a matter of law, that he or any class of persons was deprived of the equal protection of the laws or of equal privileges and immunities under the laws as a result of the alleged conspiracy. To satisfy this element, the plaintiff must show a deprivation of equal protection, privileges or immunities secured by a specific statute or constitutional provision. In this respect, he has alleged that he was denied rights guaranteed under the 13th and 14th Amendments, and rights guaranteed under 42 U.S.C. Sections 1981 and 2000e.

In order to prevail on his claim that there existed a conspiracy to deprive him of his due process and equal protection rights guaranteed by the 14th Amendment, the plaintiff must show state action; i.e., a conspiracy with state employees or officials (state actors). *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1533-34 (11th Cir. 1986) ["Private actors may be liable for infringement of 14th Amendment rights *only* through conspiracy with state actors in violation of 42 U.S.C. Section 1985(3)." *Id.* (emphasis ours)].

All of the named defendants are "private" actors. There is no allegation -- and certainly no proof -- that the corporation, or any corporate employee, combined or conspired with any state actor. Hence, Baker's claim under Section 1985(3), to the extent it is predicated on 14th Amendment violations, must fail. Additionally, any claim plaintiff intends to assert directly under the 14th Amendment must be denied as well, for the same reason.

Likewise, any claim predicated on a deprivation of equal protection rights guaranteed by 42 U.S.C. Section 2000e (Title VII) must fail. Title VII can not form the basis of a suit brought pursuant to Section 1985(3) the rationale being that

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between corporate employees and the corporation. We choose to follow this more recent expression of the law.

allowing such a claim would permit a plaintiff to by-pass the comprehensive procedural requirements of Title VII. *Great American Federal Savings & Loan Assoc. v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979).

So, what we have left is plaintiff's Section 1985(3) claim based on alleged violations of the 13th Amendment and 42 U.S.C. Section 1981. A conspiracy to violate the 13th Amendment may form the basis of a suit brought pursuant to Section 1985(3). *Griffin v. Breckinridge*, 403 U.S at 106-106, 91 S.Ct. at 1799-1800. In addition to abolishing slavery and involuntary servitude, the 13th Amendment gives Congress the authority to legislate against acts of any state and any private individual which constitute the "badges and incidents of slavery". So, the Thirteenth Amendment is implicated when it is alleged that a private individual or entity deliberately acted in a way to segregate, humiliate or belittle a person of the Negro race in a way that prevented such a person from freely exercising a right guaranteed to all citizens. In short, a conspiracy to violate the Thirteenth Amendment as proscribed by Section 1985(3) involves intentional discrimination on the basis of a black person's race or color.[12]

A claim predicated on a conspiracy to deprive any person of rights guaranteed by 42 U.S.C. Section 1981 may also form the basis of an action brought pursuant to Section

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[12] The plaintiff does not claim, nor is there any evidence to show, that he was forced into involuntary servitude. In addition to an outright prohibition on slavery and involuntary servitude, the Thirteenth Amendment also prohibits acts which classify a person as a former slave. For example, treating black persons different from white persons, and thereby segregating them, may violate the Thirteenth Amendment.

The plaintiff may not maintain a cause of action directly under the Thirteenth Amendment for employment discrimination. See, *Sanders v. A.J. Canfield Co.*, 635 F.Supp. 85 (N.D. Ill.1986); *Westray v. Porthole, Inc.*, 586 F.Supp. 834 (D.Md.1984); and *Vietnamese Fisherman's Assoc. v. Knights of Ku Klux Klan*, 518 F.Supp. 993 (S.D.Texas 1981). Rather, the plaintiff must base his claims on one of the implementing statutes, e.g., 42 U.S.C. Section 1985(3) or Section 1981. So, any claim plaintiff intends to assert directly under the Thirteenth Amendment is dismissed.

1985(3). Like a claim predicated on 13th Amendment violations (where the plaintiff claims that the defendant acted to impose upon him the "badges and incidents of slavery"), the plaintiff must show intentional discrimination on the basis of race.

In order to prevail on his Section 1985(3) claim -- whether it is predicated on violations of the Thirteenth Amendment, or Section 1981, or both -- the plaintiff must prove at least two things: (1) A conspiracy, and (2) intentional discrimination on the basis of his race. As previously discussed, the plaintiff would be unable to show a conspiracy as a matter of law, and, therefore, his entire claim under Section 1985(3) must fail. But, even if plaintiff was not legally foreclosed from showing a conspiracy based on the facts of this case, the facts do not show any intent to discriminate, or any intent to violate the substantive provisions of the Thirteenth Amendment and/or Section 1981. In short, the plaintiff has failed to come forward with significant probative evidence to show that the defendant intended to deny the plaintiff rights guaranteed by the Thirteenth Amendment and/or Section 1981, or to raise an issue of fact in that regard.

Title VII and Section 1981 Claims

42 U.S.C. Section 1981 guarantees to all persons within the jurisdiction of the United States certain enumerated rights (for e.g., the right to make and enforce contracts, to sue, be parties and give evidence, etc.). The elements of a claim under this section are: (1) That plaintiff is a member of a racial minority; (2) An intent to discriminate on the basis of race by the defendant; and (3) That the discrimination concerned an "enumerated activity" (i.e., one of those activities, or rights, directly or indirectly enumerated in the statute). The "enumerated activity" implicated in this case is the right to "make and enforce contracts". Racial discrimination concerning employment contracts is within the purview of Section 1981. *See, Johnson v. Railway Express Co.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

Title VII (42 U.S.C. Section 2000e) prohibits certain

employment practices, to wit: Failing or refusing to hire or discharging any individual, or otherwise discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. Section 2000e-2(a)(1). In order to prevail on a claim brought pursuant to Title VII, a complainant must show that (1) He is a member of a protected group (e.g. racial minority); and, (2) That race -- or some other unlawful criteria -- was a motivating factor in the employment decision or practice which was applied to him (i.e. an intent to discriminate).

It is generally recognized that proof sufficient to sustain a claim under Title VII will also support a claim under Section 1981 and vice-versa. *Scarlett v. Seaboard Coastline Railroad Co.*, 676 F.2d 1043, 1052-53 (5th Cir. 1982), *citing, Baldwin v. Birmingham Board of Education*, 648 F.2d 950, 954-55 (5th Cir. 1981). *See, also, Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266 (1984) and *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129 (10th Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct 349, 78 L.Ed.2d 314 (1983). So, we may consider both of these claims -- and the proof relating to them -- together.

The plaintiff's employment discrimination claims are essentially ones for disparate treatment. The plaintiff contends that his employer treated him, a black male, differently than other similarly situated white male employees and that the only apparent reason for this disparity in treatment was the plaintiff's race or color. Within the specific factual context of this case, the plaintiff claims that he was discharged from employment based on allegations of sexual harassment of female employees whereas other white males also accused of sexual harassment were not discharged.

The allocation of proof in disparate treatment cases is as follows: First, the plaintiff must present, by a preponderance of the evidence, a prima facie case of discrimination. To do this, the plaintiff must show that he was discharged under circumstances which give rise to an inference of discrimination. Second, once the plaintiff has proved a prima facie case of

discrimination, the burden shifts to the defendant who must produce evidence that a legitimate non-discriminatory reason (or reasons) existed for the challenged employment action. Note that the defendant's burden here is only one of production, not persuasion. Third, the plaintiff must then show, by a preponderance of the evidence, that, notwithstanding the articulated reason for his discharge, he was terminated because of his race and the reasons put forth by the defendant are a mere pretext for accomplishing the discriminatory act. *See, McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 817, 824-25 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981); and *Mauter v. Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987).

In order to prove a prima facie case of discriminatory discharge, the plaintiff must show that he is a member of a racial minority, that he was qualified for the position he held and was performing it satisfactorily, that he was discharged, and that he was replaced by a non-minority person whose qualifications were equal to, or inferior, to his. *See, e.g., Mauter v. Hardy Corp.*, at 1556-1557 (based on a modified version of the four-part test set forth in the *McDonnell-Douglas case*). Compare, *Davin v. Delta Airlines, Inc.*, 678 F.2d 567, 570 (5th Cir. 1982).

After a review of the record before us, we find that the plaintiff has shown that he is a member of a racial minority (he is black), that he was qualified for his position and was performing his duties in a satisfactory manner, and that he was discharged. There is no evidence to show that the plaintiff was replaced by a non-minority person whose qualifications were equal to, or inferior, to his.

Although the plaintiff states in his unfiled affidavit that he was replaced by an unnamed white male whose qualifications were inferior to his, this statement is insufficient to prove that fact or to create an issue fact, as there is nothing to show that plaintiff's statement is based on personal knowledge. Moreover, it appears to be merely conclusory, and is unsupported by other factual statements to verify its accuracy. For instance, had the plaintiff included the name of

this person, his training, the store at which he was working, and other similar facts, an issue of fact might have been created.

Instead, we must find that the plaintiff has failed to carry his burden of presenting a prima facie case of discrimination. Since this would be an essential element of plaintiff's proof at trial, this failure results in summary judgment in favor of the defendant.

Even if plaintiff had met his initial burden, we would still be required to enter summary judgment in favor of the defendant, since the defendant has produced a legitimate, non-discriminatory reason for the plaintiff's discharge. An employer who shows that there were reasonable grounds to believe that the discharged employee had made unwelcome sexual overtures to female employees rebuts any prima facie case presented by the plaintiff. *French v. Mead Corp.*, 33 FEP Cases 635 (S.D. Ohio 1983); *Jones v. Intermountain Power Project*, 794 F.2d 546 (10th Cir. 1986).

The plaintiff contends in his unfiled affidavit and in deposition that none of the alleged incidents of sexual harassment occurred. Technically, it is not really relevant whether they occurred or not. What is important is that McDONALD'S had reasonable grounds to believe that they had occurred. In this case, it appears that there was ample support for McDONALD'S belief.

An investigator was designated to interview the women who had accused the plaintiff. This investigator attempted to interview the plaintiff (to get the plaintiff's side of the story), however, the plaintiff refused to speak with the investigator. Not only was there more than one incident of sexual harassment alleged, but there was more than one accuser. Furthermore, at least two of the women accusing the plaintiff were black ("Alice" and Preshell Mills). It does not appear that any of these women had any reason to falsely accuse the plaintiff, nor does it appear that any of these women were working in concert with one another (in fact, that is not even alleged). All of these circumstances support the defendant's position that there were reasonable grounds to believe that the

plaintiff had sexually harassed female employees.

The plaintiff argues that the charges of sexual harassment were a mere pretext for discrimination. In this respect, he states as follows:

> 1. He was never told of McDONALD'S policy prohibiting sexual harassment.
>
> 2. He was really fired because he had given his former supervisor's girlfriend a low rating.
>
> 3. That several McDONALD'S employees had had affairs with, or had dated, or had even married other McDONALD'S employees and they had not been fired.
>
> 4. That two white male supervisors -- Charles Selebra and Fred Collins -- had sexually harassed female employees and had not been fired.

We will discuss each reason separately.

First, as an area supervisor, the plaintiff understood that his duties included the prevention and elimination of racial and sex discrimination in the workplace (Plaintiff's deposition, Volume II; pp. 50-54). Not only was the problem of sexual harassment discussed at one training program plaintiff attended in late 1981 (plaintiff's deposition, Volume I; pp. 113-116), but plaintiff also admits to having had some "common sense" understanding of what would constitute unacceptable behavior in the workplace (Volume I; pp.122-124, 149; Volume II; pp. 50-54). Plaintiff's understanding was such that he reprimanded several male employees who had made suggestive remarks to a female employee. Thus, it is not important whether the plaintiff knew the exact wording of McDONALD'S policy against sexual harassment. What is significant is that the above facts demonstrate that the plaintiff knew what type of conduct was inappropriate to the workplace, or among employees.

Second, the plaintiff contends that he was fired because he gave Marie Sakelos, one of the managers plaintiff

supervised and the alleged girlfriend of plaintiff's supervisor, a low rating. He supposedly gave her a "three". A "five" is the lowest rating available. (Plaintiff's deposition, Volume I; pp.195-197). We note here that this contention does not involve racial discrimination. While it implies that plaintiff may have been fired for some other improper motive, it does not involve an employment practice prohibited by Section 1981 and Section 2000e. In any case, this contention by the plaintiff (made in his unfiled affidavit) is refuted by his own deposition testimony, where he states that the lowest rating he ever gave was a "three" and he gave that rating to a manager named Joe Kopezza (Plaintiff's Deposition, Volume I; pp. 197 - 200). Furthermore, Fred Collins (the alleged boyfriend of Marie Sakelos) was not plaintiff's supervisor when he did rate her. (Plaintiff's deposition, Volume I; pp. 197-198; Volume III; pp. 27-33).

Third, in stating that several McDONALD'S employees were dating one another and were not terminated, the plaintiff exhibits a lamentable failure to perceive the difference between unwelcome sexual advances and a relationship between consenting adults. There is not a scintilla of evidence to show that any other McDONALD'S employee violated a corporate policy by engaging in a voluntary social relationship with other employees. A consensual relationship is a far cry from the conduct plaintiff was accused of committing. In sum, the plaintiff was not fired because he was dating another employee. He was fired for allegedly pressuring unwilling female employees to have sex with him.

Last, but not least, it is plaintiff's contention that other white males at McDONALD'S sexually harassed female employees and were not discharged as he was. These alleged incidents involve two white males -- a Mr. Selebra and a Mr. Fred Collins.

Baker claims that a white female employee named Patricia Fullbright told him that her manager, Mr. Selebra (who was married) wanted to have an affair with her, but she had refused. As a result her refusal, she had been, or was going to be, discharged [Plaintiff's deposition, Volume II; pp. 73-75]. Ms.

Fullbright also told the plaintiff that she had, or was going to, complain to Mr. Selebra's supervisor, a Mr. Steve Reynolds [plaintiff's deposition, Volume II; pp. 74-75]. No affidavit or other document made by Ms. Fullbright or Mr. Reynolds was submitted by the plaintiff. Baker's testimony as to those facts is inadmissible hearsay, and may not be considered on a motion for summary judgment. *See*, Fed. R. Civ. Pr. 56(e). In addition, though plaintiff states that Ms. Fullbright *said* she was going to complain to Mr. Selebra's supervisor, there is no evidence to show that she ever did complain to a McDONALD'S supervisor, except the plaintiff. The plaintiff does not state that he passed her complaint on to anyone else.

Baker also claims that his former supervisor, Fred Collins, engaged in sexual harassment and was not fired. The first of these alleged incidents concerned a Ms. Debra Davis. Ms. Davis's affidavit is included with the defendant's motion for summary judgment (D.E. 25, Attachment 7). Ms. Davis states that when she was introduced to Fred Collins in 1980, she thought he had touched her in an offensive way when they were shaking hands. She immediately complained, and Mr. Collins apologized. Ms. Davis states that, as far as she is concerned, the entire incident was a misunderstanding and denies that Fred Collins had ever sexually harassed her in any way.

Baker's description of a second incident involving Fred Collins is similar to the charge he makes against Mr. Selebra. Baker alleges that Fred Collins was "trying to date" a Ms. Sue Polozker, but she would have nothing to do with him. As with Baker's contentions regarding Ms. Fullbright and Mr. Selebra, his account of this incident is inadmissible hearsay which may not be considered here.

So, after a consideration of all of plaintiff's "proofs" in opposition to the motion for summary judgment, there is nothing before us to support his allegation that the reason given by the defendant McDONALD'S for his discharge was a pretext for discrimination. Accordingly, summary judgment should be entered in favor of the defendant on plaintiff's claims

brought pursuant to 42 U.S.C. Sections 1981 and 2000e.

Slander and Defamation Claims

The plaintiff claims that McDONALD'S defamed him by publishing the fact of his discharge and the reasons therefore to other McDONALD'S employees and to plaintiff's prospective employers. In order to prevail on a claim for slander and/or defamation, the plaintiff must show that the defendant made a false statement of fact of or concerning the plaintiff, that the false statement was communicated to a third person, with malice, and that the plaintiff sustained damages. *See, e.g. Axelrod v. Califano*, 357 S.2d 1048 (Fla. 1st DCA 1978). Here, we will only concern ourselves with the element of publication, which is one of the essential elements of a claim for defamation/slander. *Owner's Adjustment Bureau, Inc. v. Ott*, 402 So.2d 466 (Fla. 3d DCA 1981).

It is abundantly clear that any publication to other McDONALD'S employees (except the plaintiff's supervisors) concerning the cause of plaintiff's discharge was made by the plaintiff, not by McDONALD'S. *See*, Plaintiff's deposition, Volume III; pp. 103, 115-116, 153-163. Not only does the plaintiff have no evidence to show that McDONALD'S communicated his discharge and the reason for it to any other McDONALD'S employee, but plaintiff also admits that he has no evidence to show that McDONALD'S communicated those facts to any company where the plaintiff had an application for employment pending. *See*, Plaintiff's deposition, Volume III; pp. 146-149.[13] Since publication is an essential element of plaintiff's claim which he would have to prove at a trial, this complete lack of proof as to any publication warrants the entry of summary judgment in favor of defendant McDONALD'S.

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[13] The plaintiff claims that a McDONALD'S supervisor did tell his (plaintiff's) brother-in-law that plaintiff had been discharged for sexual harassment (plaintiff's deposition, Volume III, pp. 128-129), however, this statement is hearsay. No affidavit by plaintiff's brother-in-law, or other admissible testimony, was filed by the plaintiff to show this.

In view of all of the foregoing, it is therefore

ORDERED and ADJUDGED that the defendant's motion for summary judgment (D.E. 25) is Granted on all of the claims asserted in the complaint. Consequently, the Clerk shall enter judgment in favor of the defendant and against the plaintiff who shall take nothing. The defendant shall be awarded all of its costs as part of this judgment, since the defendant is the prevailing party. The defendant shall submit an affidavit as to costs within fifteen (15) days from the date of this Order. As part of this judgment, the defendant is entitled to its attorney's fees incurred as a result of the Title VII claim. Therefore, the defendant shall submit an affidavit as to its total attorney's fees, conforming to the criteria set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974), as adjusted by *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911 (11th Cir. 1982). One seventh of the total fee shall be awarded to defendant as prevailing party in the Title VII action (*See*, Our Order Granting Motion for Sanctions in Part for a further discussion as to attorney's fees). The defendant shall submit said affidavit, and any legal memoranda it wishes the Court to consider in connection therewith, within fifteen days from the date of this Order. The plaintiff shall have ten (10) days from the date he receives the defendant's submissions to file objections or legal memoranda in opposition to the amount of attorney's fees.

It is FURTHER ORDERED and ADJUDGED that any factual findings which were included in the section labeled "Conclusions of Law" are hereby made a part of the findings of fact of this Court, and vice-versa.

ROBERT BAKER, Plaintiff,

v.

McDONALD'S CORPORATION, Defendant

Case No. 83-6313-Civ.

United States District Court,
S.D. Florida.

Dec. 4, 1987.

William N. Hutchinson, Jr.,
Fort Lauderdale, Fla., for plaintiff

Jeffrey McClellan
Atlanta, Ga., for defendant

ORDER GRANTING MOTION FOR SANCTIONS IN PART

PAINE, District Judge.

This cause is before the Court upon the defendant's motion for sanctions and supplemental request for sanctions (D.E. 25 and 63) against the plaintiff's attorney and/or the plaintiff for the bringing of this employment discrimination suit. On this same date, we have entered an Order granting the defendant's motion for summary judgment. After a review of the pleading, admissions, depositions, affidavits and other documents on file, we make the following findings:[1]

1. As part of his complaint against this defendant, plaintiff's attorney asserted causes of action predicated on

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[1] In this Order, we rely on the findings and fact and conclusions of law set forth in our Order Granting Summary Judgment. The reader is directed to refer to that Order.

violations of the Thirteenth and Fourteenth Amendments to the U.S. Constitution, and violations of 42 U.S.C. Sections 1981, 1983, 1985(3) and 2000e, as well as a common-law claim for slander and/or defamation.

2. The *Federal Rules of Civil Procedure*, Rule 11, provides that,

> The signature of an attorney or a party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . .

That rule further provides that any attorney who violates Rule 11 may be liable for sanctions, including costs and reasonable attorney's fees.

3. In this case, the claim brought directly under the Thirteenth Amendment was not warranted by existing law, since claims predicated on violations of Thirteenth Amendment must be brought pursuant to one of the implementing statutes, such as 42 U.S.C. Section 1981. Likewise, the plaintiff's claim brought pursuant to 42 U.S.C. Section 1985(3), to the extent that it was predicated on an alleged conspiracy to violate Title VII, was not warranted by existing law.

4. Plaintiff's claim asserted directly under the Fourteenth Amendment, and plaintiff's claim pursuant to 42 U.S.C. Section 1983 were not well grounded in fact. It is axiomatic that such claims require state action, and it has been evident from the inception of this case that the defendants were wholly private actors. This fact hardly needed any inquiry, as it fairly jumps out at one. To the same extent, any claim plaintiff asserted under Section 1985(3) for a conspiracy to deprive him of rights guaranteed by the Fourteenth Amendment, was not well-grounded in fact.

5. At the time this suit was filed, there was nothing to indicate that McDONALD'S had slandered or defamed the plaintiff. Even after a reasonable period of time after the filing of this suit and after discovery had been underway, the plaintiff had no evidence to show that the defendant had defamed him in any way. In short, the plaintiff had no facts at the time this suit was filed which would indicate that McDONALD'S had said anything about him to anyone. As we noted in our Order Granting Summary Judgment, it was the plaintiff who announced to his former co-employees that he had been discharged for sexual harassment. So, we find that this claim, too was not well-grounded in fact.

6. We also find that plaintiff's claim under Section 1985(3) for an alleged conspiracy to deprive him of rights guaranteed by the Thirteenth Amendment and 42 U.S.C. Section 1981 was not well-grounded in fact. There were no facts to show that any individual employee of the corporation combined or conspired with any other employee to do anything against the plaintiff. The plaintiff simply concluded in his complaint that a conspiracy had existed without having any fact to show that any person had acted in concert with another.

It should be noted that we base our finding here on the lack of facts -- not law. The defendant argues that, based on the facts of this case, the only conspiracy which could have existed was one among corporate employees and, as a matter of law, a conspiracy among corporate employees may not exist. While it is true that the most recent cases hold that a conspiracy among corporate employees does not constitute a "conspiracy" within the meaning of the law (a legal theory which we have adopted and followed in this case), there are cases which hold otherwise. So, we can not say that the plaintiff's conspiracy allegations were not warranted by existing law.

7. While we have our doubts as to whether any claim should ever have been filed based on the facts of this Case, we will give the plaintiff the benefit of the doubt and allow that his Title VII claim was not so baseless and frivolous as to justify the imposition of sanctions. Because of the limited

amount of time afforded to complainants under Title VII in which to file suit, the plaintiff's attorney may not have had a large amount of time in which to conduct a pre-filing investigation of plaintiff's Title VII claim. Because plaintiff's claim pursuant to 42 U.S.C. Section 1981 involved the same allegations and facts as his claim under Title VII, as well as the same sources and standards of proof, we will not impose sanctions for the filing of that claim (although the time limitations imposed on Title VII suits do not apply to suits brought under Section 1981).

8. In summary, then, we find that all of plaintiff's claims except those asserted under 42 U.S.C. Section 1981 and Section 2000e, were either not warranted by existing law or not well-grounded in fact. We also note one aggravating factor: During the course of Delores Baker's deposition, when it was pointed out to plaintiff's counsel that there was absolutely no factual basis for any claim asserted under the Fourteenth Amendment or pursuant to 42 U.S.C. Section 1983, counsel for the defendant requested plaintiff's attorney to voluntarily dismiss those claims so that the defendant would not be required to litigate them further. Counsel for plaintiff refused. See, Attachment to D.E. 64. †

We do not mean to imply that an attorney should bow to threats made by opposing counsel. On the other hand, if it wasn't apparent to Mr. Hutchinson at the inception of this suit that a claim based on the Fourteenth Amendment and/or Section 1983 was not legally cognizable under the facts of this case, it certainly should have been at the time Mrs. Baker's deposition was taken. We note further that, not only did Mr. Hutchinson fail to file a response to the motion for summary judgment, he also failed to respond to the defendant's first motion for sanctions. Moreover, although he did file a response to the defendant's supplemental request for sanctions, that response did not address the issues raised by the defendant (and was legally incorrect to boot!).

In view of all of the foregoing, we find that the imposition of sanctions is warranted. We must now determine against whom these sanctions should be imposed (i.e., either

the plaintiff, his attorney, or both) and in what amount.

9. It is our opinion that it is the plaintiff's attorney who is the offending party here. Mr. Hutchinson was the person who drafted the complaint and who chose which causes of action would be asserted. It was Mr. Hutchinson who signed the pleadings, and who should have known that the facts of this case, not to mention the law, did not support certain of the claims asserted. Accordingly, we find that Mr. Hutchinson has run afoul of Rule 11 and should be made to pay the price.

10. In determining what that price might be, we are concerned with two factors: First, to deter Mr. Hutchinson from filing baseless suits in the future; and, Second, to compensate the defendant for having had to defend certain claims which should never have been brought. Rather, than impose an outright fine which has no relation to the harm suffered by the defendant, it is our opinion that the appropriate sanctions in this case should be a measure of the defendant's attorney's fees. Therefore, it is

ORDERED and ADJUDGED as follows:

1. The defendant shall file, within fifteen days from the date of this Order, an affidavit of attorney's fees. Said affidavit shall conform to the criteria set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). Thereafter, the plaintiff's attorney shall file a response to the affidavit within ten (10) days of receipt of the defendant's affidavit.

2. According to our computations, there were seven (7) causes of action asserted in the complaint: The Thirteenth and Fourteenth Amendment claims, the claims pursuant to 42 Sections 1981, 1983, 1985(3) and 2000e, and the common law slander/defamation claim. Five (5) of these claims were found to have been either not warranted by existing law, or not well-grounded in fact. Accordingly 5/7th's of defendant's total attorney's fee, as determined by the undersigned as a "reasonable" fee, shall be awarded as sanctions against counsel for the plaintiff.

3. This Order is made in conjunction with the Order granting summary judgment. The parties may file one submission regarding attorney's fees, which will satisfy both Orders.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5034
Non-Argument Calendar

D. C. Docket 83-6313

ROBERT BAKER,

Plaintiff-Appellant,

versus

McDONALD'S CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(December 21, 1988)

Before: TJOFLAT, HILL and JOHNSON, Circuit Judges:

PER CURIAM:

The judgment granting defendant's motion for summary judgment is affirmed based on the order granting motion for Summary Judgment, Findings of Fact and Conclusions of Law of the Honorable James C. Paine, dated and filed December 4, 1987.

Appeal from the imposition of sanctions also is pending. In the complaint, plaintiff's attorney asserted causes of action predicated on violations of the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S. C. § § 1981, 1983, 1985(3), and 2000e. Counsel also asserted a common-law slander and/or defamation claim.

Rule 11 of the Federal Rules of Civil Procedure reads in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 11 further provides that a violator of the rule may be liable for an appropriate sanction which may include paying the opposing party the amount of its costs and a reasonable attorney's fee.

As the district court correctly decided, all but the claims asserted under 42 U.S.C. § 1981 and 2000e either were not warranted by existing law or were not well grounded in fact.

1. The claim brought directly under the Thirteenth Amendment was not warranted by existing law. A claim based on a violation of the Thirteenth Amendment must

be brought pursuant to an implementing statute such as 42 U.S.C. § 1981.

2. The claim brought directly under the Fourteenth Amendment was not well grounded in fact. Such a claim requires state action. Wholly private actors were involved in this case.

3. The claim pursuant to 42 U.S.C. § 1983 was likewise not well grounded in fact because the requisite state action was lacking.

4. The claim brought under 42 U.S.C. § 1985(3) for an alleged conspiracy to deprive plaintiff of his rights also was not well grounded in fact. Plaintiff did not present any facts to show that any employees of the corporation combined or conspired to do anything against the plaintiff. Without any facts existing to establish a conspiracy, the district court did not have to decide whether the plaintiff's allegation of a conspiracy among corporate employees was warranted by existing law.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5034

D. C. Docket 83-6313

ROBERT BAKER,

Plaintiff-Appellant,

versus

McDONALD'S CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before: TJOFLAT, HILL and JOHNSON, Circuit Judges:

BY THE COURT:

The court on its own motion makes the following change in its opinion heretofore rendered in this case. The following is deleted:

As the district court correctly decided, all but the claims asserted under 42 U.S.C. § 1981 and 2000e either were not warranted by existing law or were not well grounded in fact.

1. The claim brought directly under the Thirteenth Amendment was not warranted by existing law. A claim based on a violation of the Thirteenth Amendment must be brought pursuant to an implementing statute such as 42 U.S.C. § 1981.

In lieu thereof, the following is inserted:

With the exception of the claims asserted under 42 U.S.C. § 1981 and § 2000e, plaintiff's claims were not well grounded in fact.

1. The claim brought directly under the Thirteenth Amendment was not well grounded in fact. We do not decide whether or not a claim may be brought directly under the Thirteenth Amendment. *See Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523 (11th Cir. 1986); *Memphis v. Greene*, 451 U.S. 100 (1980); *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1981). However, an attempt to state such a claim fails in this case where "no badge or incident of slavery" is even remotely involved. No significant probative evidence was presented to support a claim that the defendant denied the plaintiff rights guaranteed by the Thirteenth Amendment.

Appellant's motion to supplement the record on appeal is DENIED.

Appellant and his counsel, William N. Hutchinson, filed separate Suggestions of Rehearing In Banc that are construed as Petitions for Rehearing and Suggestions of Rehearing In Banc. The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

Any other motion pending in this case is DENIED.

Supreme Court, U.S.
FILED
JUN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1887

in the
Supreme Court
of the
United States

OCTOBER TERM, 1988

WILLIAM N. HUTCHINSON, JR., Esq.,
Petitioner,

vs.

McDONALD'S CORPORATION,
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF McDONALD'S CORPORATION IN OPPOSITION

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QUESTION PRESENTED

WHETHER A UNITED STATES DISTRICT COURT CORRECTLY IMPOSED SANCTIONS FOR ATTORNEY MISCONDUCT

PARTIES TO PROCEEDING BELOW

This action began as a complaint filed by plaintiff, ROBERT BAKER, against defendants, McDONALD'S CORPORATION, ROBERT WISEMULLER, JEAN ACIERNO and FRED COLLINS. Petitioner, WILLIAM N. HUTCHINSON, JR., Esq. was the attorney for plaintiff, ROBERT J. BAKER.

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PETITIONER'S ARGUMENT IS UNTIMELY AND NOT PROPERLY BEFORE THIS COURT

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN IMPOSING SANCTIONS ON PETITIONER.

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NO. 88-1887

in the
Supreme Court
of the
United States

OCTOBER TERM, 1988

WILLIAM N. HUTCHINSON, JR., Esq.,
Petitioner,

vs.

McDONALD'S CORPORATION,
Respondent.

OPINION BELOW

The Order Granting Motion for Sanctions in Part by the United States District Court for the Southern District of Florida, Paine, J., is reported at 686 F.Supp. 1485 (S.D. Fla. 1987) (Petitioner's Appendix 2). A related Order Granting Motion for Summary Judgment, Findings of Fact and Conclusions of Law is reported at 686 F.Supp. 1474 (S.D. Fla. 1987) (Petitioner's Appendix 1). The opinion of the Court of Appeals for the Eleventh Circuit was not published (Petitioner's Appendix 3). The Order of the Eleventh Circuit Court of Appeals on Petitioner's Petition for Rehearing *En Banc* was not published (Petitioner's Appendix 4). All of the opinions reprinted in Petitioner's Appendix shall hereinafter be referred to as "Pet. App. __."

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on December 21, 1988. A Petition for Rehearing was filed January 19, 1989. The Petition was denied February 21, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Prior to the 1983 amendment, Rule 11 provided:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation

of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

As amended, effective August 1, 1983, Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this

rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses, incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

On April 25, 1983, Petitioner William N. Hutchinson (hereinafter "Petitioner") filed a Complaint in the United States District Court for the Southern District of Florida (hereinafter "District Court") on behalf of his client, Robert J. Baker (hereinafter "client"). Petitioner alleged numerous causes of action based on his client's termination of employment by Respondent McDonald's Corporation (hereinafter "Respondent"). The causes of action included racial discrimination in violation of 42 U.S.C.§§ 1981, 1983, 1985 and 2000e, as well as the Thirteenth and Fourteenth Amendments of the United States Constitution and additional actions for defamation and slander under Florida law (Pet. App. 1).

On December 4, 1987, the District Court found no merit to any of Petitioner's allegations and granted Respondent's Motion for Summary Judgment, reported at 686 F.Supp. 1474 (S.D. Fla. 1987) (Pet. App. 1). In a separate Order issued concurrently and reported at 686 F.Supp. 1485 (S.D. Fla. 1987), the District Court imposed sanctions in part against Petitioner pursuant to Federal Rules of Civil Procedure 11 (hereinafter "Rule 11") (Pet. App. 2). In its Order granting Motion for Summary Judgment, the District Court directed Petitioner's client, Plaintiff in the action below, to pay one-seventh (1/7) of Respondent's reasonable

attorney's fees plus costs (Pet. App. 1–21). In its Order granting Motion for Sanctions in Part, the District Court directed Petitioner to pay five–sevenths (5/7) of Respondent's reasonable attorney's fees (Pet. App. 2–5). The District Court directed Respondent to submit a bill of costs and application for attorney's fees to the Court within 15 days (Pet. App. 1–21, 2–5). Pursuant to the District Court's Orders, Respondent timely filed a Bill of Costs and Application for Attorney's Fees. While the District Court granted them the opportunity to file objections to Respondent's proposed bill of costs and fees within 10 days, Petitioner and his client chose not to file any objections.

On January 4, 1988, Petitioner filed with the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") a Notice of Appeal from the Orders granting Summary Judgment and Imposing Sanctions in Part. Petitioner's brief to the Eleventh Circuit never raised an issue that Rule 11 was incorrectly applied.

During the pendency of the Eleventh Circuit appeal Respondent moved the District Court to enter judgment against Petitioner and his client in the amount of the requested attorney's fees and costs on January 20, 1988. On August 23, 1988, the District Court granted Respondent's Motion and ordered Petitioner's client to pay Respondent the sum of $7,042.07 in attorney's fees, plus costs in the amount of $3,827.66. The District Court further directed that Petitioner pay Respondent $35,210.35 in attorney's fees. Petitioner and his client did not appeal the August 23, 1988 Order and Judgment of the District Court.

On December 21, 1988, the Eleventh Circuit issued a final judgment affirming the District Court's December 4, 1987 Orders granting Respondent's Motions for Summary Judgment and Imposing Sanctions in Part (Pet. App. 3). Subsequently, on January 9, 1989,

Petitioner filed a Motion for Rehearing *En Banc* claiming for the first time that the District Court incorrectly applied Rule 11. The Eleventh Circuit subsequently upheld its earlier affirmance of the District Court's Orders and denied Petitioner's Motion for Rehearing *En Banc* on February 21, 1989 (Pet. App. 4). The Eleventh Circuit modified ***sua sponte*** its earlier opinion regarding a party's inability to file an action directly under the Thirteenth Amendment. The court stated that a party could file an action directly under the Thirteenth Amendment, but further stated no factual basis for such action was present in the case at bar (Pet. App. 4–2).

Implicit in the Orders of both the District Court and the Eleventh Circuit is the recognition that Petitioner filed and prosecuted the instant action for over five (5) years knowing that it was entirely without merit and unsupported in fact or law. The actions of the lower courts were correct and fully supported by well–established precedent. Accordingly, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

PETITIONER'S ARGUMENT IS UNTIMELY AND NOT PROPERLY BEFORE THIS COURT.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN IMPOSING SANCTIONS ON PETITIONER.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH TWO OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

Petitioner's Argument is Untimely and Not Properly Before this Court.

An Appellate Court will refrain from ruling on issues not previously decided by the trial court. Similarly, an ***en banc*** court will not address arguments not passed on by the trial court or the appeals court. Moreover, issues raised for the first time during a motion for rehearing have been adjudged untimely and precluded consideration by this Court in a Petition for Writ of Certiorari.

The general rule that a Federal Appellate Court will not consider an issue not passed upon by the trial court was delineated in ***Hormel v. Helvering,*** 312 U.S. 552, 61 S.Ct. 719, 83 L.Ed. 1037 (1941). In ***Hormel*** the Court stated that this rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues. . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." 312 U.S. at 556, 61 S.Ct. at 723. This Court further stated that the only

circumstances in which a Federal Appellate Court is justified in resolving an issue not passed on below was where "injustice might otherwise result." 312 U.S. at 557, 61 S.Ct. at 721. This Court reiterated the general rule in *Singleton v. Wulff*, 428 U.S. 106, 120–21, 96 S.Ct. 2868, 2877, 49 L.Ed. 2d 826 (1976). The Federal Courts of Appeal have followed this rule and found that issues raised for the first time in a Motion for Rehearing were untimely and not properly before the court for consideration. *Wells v. Rushing*, 760, F.2d 660 (5th Cir. 1985).

In *Wells*, the Fifth Circuit was presented with a Petition for Rehearing raising an issue not presented to the trial court or argued in the original appeal. Citing *Singleton*, the court held that, "[H]aving raised the issue neither below nor before us, Wells' complaint on Petition for Rehearing comes too late." *Id.* at 661. *See also, Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984); *Joseph v. New Orleans Pension and Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 526 (1985); *United States v. Sutherland*, 428 F.2d 1152, (5th Cir. 1970) ("Having tried and appealed its case on one theory, an unsuccessful party may not then use a Petition for Rehearing as a device to test a new theory." *Id.* at 1158.)

Similarly, in *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985), the Eleventh Circuit found that an appellant's attempt to raise an issue not previously addressed to the trial court or in the original appeal would not be ruled upon by an *en banc* court. The court stated, "it is especially inefficient for the *en banc* court to rule on matters not ruled upon by the district court or a panel of the court, and an *en banc* court should not rule on issues which do not clearly merit consideration under Fed.R.App. P. 35." *Id.* at 1155. *See also, Holley v. Seminole County School District*, 763 F.2d 399, 401 (11th Cir. 1985). Likewise, the Eighth Circuit and Third Circuit Courts of Appeals have refused to address

issues in a Motion for Rehearing not raised either at the trial court level or in the original appeal. *Jamestown Farmers Elevator, Inc. v. General Mills,* 552 F.2d 1285, 1296 (8th Cir. 1977); *In Re Sugar Industry Anti-Trust Litigation. Stodder & Co., Inc. v. Amstar Corp.* 579 F.2d 13, 20 (3rd Cir. 1978).

In the case at bar, Petitioner appealed the District Court's Order Imposing Sanctions but never argued that the District Court incorrectly applied Rule 11. Although more than one year elapsed between the District Court's imposition of sanctions and the Eleventh Circuit's affirmance, Petitioner challenged the District Court's application for the first time in its Motion for Rehearing *En Banc.* Petitioner's attempt to raise this issue in the Motion for Rehearing *En Banc* was untimely and not properly before the court. Accordingly, the Eleventh Circuit's failure to address the issue in the Motion for Rehearing *En Banc* is consistent with this Court's holdings in *Hormel* and *Singleton.*

This Court should also deny Petitioner's Petition for Writ of Certiorari for failure to timely raise the issue. This Court has previously refused to address arguments raised for the first time in Motions for Rehearing in the Court of Appeals in *Air France v. Saks,* 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985) and *Hoover v. Ronwin,* 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). In *Air France* this Court expressly followed its doctrine first announced in Note 25 of *Hoover* that arguments raised for the first time in a Motion for Rehearing in the Court of Appeals are precluded from consideration by this Court. *Air France,* 470 U.S. at 409, 105 S.Ct. 1346–47; *Hoover,* 466 U.S. at 575 n.25, 104 S.Ct. 1998, n.25. In examining a Petitioner's argument raised for the first time during a Motion for Rehearing in the Court of Appeals, this Court observed, "[Petitioner's] failure to raise

this issue in a timely manner precludes our consideration." *Hoover,* 466 U.S. at 576 n.25, 104 S.Ct. at 1998 n.25.

As in *Air France,* Petitioner in the case at bar also failed to raise the alleged incorrect application of Rule 11 by the District Court until filing his Motion for Rehearing *En Banc* in the Court of Appeals. Accordingly, Petitioner should be precluded from raising this issue in the Petition for Writ of Certiorari because of his failure to raise the issue in a timely manner. Following the precedent established in *Hoover* and *Air France,* the Court should deny the Petition for Writ of Certiorari because of Petitioner's failure to raise his argument in a timely manner.

Petitioner's Argument is Irrelevant Since Petitioner's Actions Were Sanctionable Under The Court's Inherent Authority to Sanction, As Well As Statutory Provisions Including The Pre-Amended Version of Federal Rule of Civil Procedure 11.

Federal courts have the inherent authority to impose attorney's fees on any party. In *Roadway Express Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), this Court recognized the inherent authority of federal courts, aside from any statutory provision, to assess attorney's fees. Relying on the decision in *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court held that costs may be awarded to a prevailing party when the unsuccessful litigant has been found to have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 421 U.S. at 258-259, 95 S.Ct. at 1622. This bad faith standard was an exception to the American Rule on attorney's fees whereby a litigant normally does recover counsel fees. This Court reasoned that courts possess the inherent power to award attorney's fees as a means for protecting the integrity of the judicial

process and that this inherent authority extends to a request for attorney's fees, costs and sanctions. The right to recover fees was not limited to actions filed in bad faith, but was also available where bad faith was found in the subsequent conduct of the litigation. *citing, Hall v. Coal,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

Similarly, in *Eastway Construction Corporation v. City of New York,* 762 F.2d 243 (2nd Cir. 1985), *cert. denied,* __ U.S. ___, 108 S.Ct. 269 (1987), the Second Circuit recognized that apart from any statutory provisions regarding attorney's fees and costs, a federal court may award attorney's fees pursuant to its inherent authority. The court relied on *Alyeska Pipeline* and its progeny in assessing costs and attorney's fees to the prevailing party where the unsuccessful litigant was found to have acted in bad faith, vexatiously, wantonly or for oppressive reasons. Likewise, in *In Re Itel Securities Litigation,* 596 F.Supp. 226 (N.D. Cal. 1984), *aff'd,* 791 F.2d 672 (9th Cir. 1986), *cert. denied,* __ U.S. ___, 107 S.Ct. 880 (1987), the district court recognized its inherent authority to assess attorney's fees against counsel pursuant to *Roadway Express* and *Alyeska Pipeline.* The court also noted that it had the statutory authority to grant attorney's fees under 28 U.S.C. § 1927 and was empowered to grant sanctions under Rule 11. *See also, United States v. Blodgett,* 709 F.2d 608 (9th Cir. 1983).

Another basis for upholding the District Court's award of attorney's fees in this case is 28 U.S.C. §1927. This section states:

> Any attorney . . . in any Court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs,

> expenses and attorney's fees reasonably incurred because of such conduct.

In *Kendrick v. Zanides,* 609 F.Supp. 1162 (D.C. Cal. 1985), the district court noted that it had discretion apart from Rule 11 to grant attorney's fees. It recognized the inherent authority to award fees pursuant to *Alyeska* and Section 1927. With respect to Section 1927, the court found that the plaintiff multiplied the proceedings unreasonably and vexatiously, entitling defendant to recover costs, expenses and fees.

In its opinion, the District Court in the case at bar discussed at great length Petitioner's continued pursuit of baseless claims when the true facts were known at the inception of the suit and were made known to Petitioner during discovery proceedings (Pet. App. 2). The District Court recognized Petitioner's bad faith pursuit of baseless claims and justifiably imposed sanctions. Accordingly, the District Court's award of attorney's fees was justified on several grounds besides Rule 11. Attorney's fees were warranted in this case based on Section 1927 and the District Court's inherent authority to impose sanctions. Respondent asserts that since the decision can be upheld on any of these grounds the Petition for Writ of Certiorari should be denied.

The imposition of sanctions under Rule 11 does not result in injustice since Petitioner's pursuit of baseless claims is also sanctionable under the pre-amended Rule 11 standard. Under the former rule, the signature of an attorney constituted a certificate by him that he had read the pleading and that to the best of his knowledge, information and belief, there was good ground to support it. This standard under the former rule was one of bad faith. *Nemoroff v. Ableson,* 620 F.2d 339 (2nd Cir. 1980); *see also, Gordon v. Heimann,* 715 F.2d 531 (11th Cir. 1983) (Eleventh Circuit upheld sanctions

for bad faith under pre-amended Rule 11 and the court's inherent authority enunciated in *Alyeska).*

Courts have approved the imposition of sanctions against a party prior to the amendment of Rule 11. For example, in *Incomco v. Southern Bell Telephone and Telegraph Co.,* 558 F.2d 751 (5th Cir. 1977), a New York partnership filed suit against Southern Bell alleging that the company had wrongfully terminated or interrupted service to the partnership's Miami office. The sole basis to establish federal jurisdiction was 47 U.S.C. §§ 206-207, Chapter 5 of the Federal Communications Act. Pursuant to pre-amended Rule 11, the district court struck the plaintiff's claims under Sections 206-207, holding these claims were without substance as a matter of law. On appeal, the Fifth Circuit observed that based on pre-amended Rule 11, where there was not good ground to support a pleading, the court could strike the pleading as sham and false. The district court further held that there were absolutely no grounds that could support the action under Sections 206-207 as a violation of Chapter 5 of the Communications Act, since the matters at issue were governed by Florida tariffs and were not subject to regulation under the Federal Communications Act. Furthermore, the court noted that there were no facts asserted which could support any violation of the Communications Act. Accordingly, the court affirmed the district court's decision to strike the Sections 206-207 claim.

Similarly, the Ninth Circuit in *Rhinehart v. Stauffer,* 638 F.2d 1169 (9th Cir. 1979), upheld a lower court's dismissal of the complaint under pre-amended Rule 11 for failure of the attorney to investigate and ascertain the merits of his client's claim. In *Rhinehart,* the plaintiff's attorney filed a civil action against the defendant for $1,000,000 in damages for defamation of the plaintiff without ascertaining from plaintiff the factual basis for plaintiff's claim. The district

court found no merit in plaintiff's claims and dismissed the suit pursuant to pre-amended Rule 11. The Ninth Circuit upheld the dismissal and chastised plaintiff's attorney stating, "[B]efore filing a civil action, the attorney has a duty to make an investigation to ascertain that it has at least some merit," *Id.* at 1171.

Likewise, a district court imposed pre-amended Rule 11 sanctions under the bad faith standard because of plaintiff's attorney's failure to properly investigate plaintiff's claim before filing an action in ***Kinee v. Abraham Lincoln Federal Savings and Loan Association,*** 365 F.Supp. 975 (E.D. Penn. 1973). In ***Kinee,*** plaintiffs had obtained mortgages from numerous separate lending institutions and subsequently brought suit alleging anti-trust violations. Plaintiffs sued on their behalf and on behalf of all those similarly situated against 177 different lending institutions. The court held that the method by which plaintiffs' attorneys chose to discover the alleged offending lending institutions was improper and censurable. The court noted that plaintiffs and their attorneys put a large number of parties to the inconvenience, expense and possible anxiety of being sued rather than conduct an appropriate investigation to identify the proper defendants. The court further observed that when the plaintiffs filed their pleadings they did not have a reasonable basis to believe that the allegations were true as to each defendant, but merely that there was, within the aggregate mass of defendants sued, a significant number who would be proper parties.

Utilizing the rationale of the *Incomco, Rhinehart* and *Kinee* courts, it is apparent that sanctions under pre-amended Rule 11 were appropriate in the case at bar. As a part of his Complaint, Petitioner asserted causes of action predicated on violations of the Thirteenth and Fourteenth Amendments to the Constitution and violations of 42 U.S.C. Sections

1983 and 1985, 1981 and 2000(e), as well as a common law claim for slander and/or defamation. The District Court granted Rule 11 sanctions on the causes of action predicated under the Thirteenth and Fourteenth Amendments to the Constitution and 42 U.S.C. Sections 1983, 1985 as well as the common law slander and defamation claims (Pet. App. 2). The decisions of the District Court and the Eleventh Circuit were appropriate under the pre-amended Rule 11 standards and did not result in any injustice. Referring to the deposition of Petitioner's client's wife wherein Respondent repeatedly urged Petitioner to withdraw his clearly baseless claims because they were without factual and legal support, the District Court observed:

> ". . . [I]f it wasn't apparent to Mr. Hutchinson [Petitioner] at the inception of this suit that a claim based on the Fourteenth Amendment and/or Section 1983 was not legally cognizable under the facts of this case, it certainly should have been at the time Ms. Baker's deposition was taken. We note further that, not only did Mr. Hutchinson fail to file a response to the motion for summary judgment, he also failed to respond to the defendant's first motion for sanctions. Moreover, although he did file a response to the defendant's supplemental request for sanctions, that response did not address the issues raised by the defendant (and was legally incorrect to boot). . . .
>
> It was Mr. Hutchinson who signed the pleadings, and who should have known that the facts of this case, not to mention the law, did not support certain of the claims asserted."

(Pet. App. 2-4, 5).

Each of Petitioner's claims was brought in bad faith and each claim was and is baseless and was asserted wantonly for purposes of harassment, delay or other improper purposes. *See, Tadeschi v. Smith, Barney, Harris, Upham and Co., Inc.*, 579 F.Supp. 657 (S.D. Dist. N.Y. 1984). *aff'd*, 757 F.2d 465 (2nd Cir. 1985), *cert. denied*, __, U.S. __, 106 S.Ct. 147 (1985). As in *Incomco*, Petitioner's claim based on 42 U.S.C. § 1985(3) was not warranted by existing law to the extent that it was predicated on an alleged conspiracy to violate Title VII which never existed. Accordingly, pre-amended Rule 11 sanctions are appropriate on this claim in accordance with the *Rhinehart* and *Kinee* holdings since a cursory inquiry into the facts would have precluded the assertion of this claim. Furthermore, Petitioner's claims based on the Fourteenth Amendment and 42 U.S.C. § 1983 were improper and brought in bad faith. Such claims require state action, *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1533-34 (11th Cir. 1986), and it is readily evident from the pleadings that no state actor was ever involved in this case. Accordingly, pre-amended Rule 11 sanctions on this claim were justifiable in accordance with *Incomco*. Finally, Appellant's claims for slander and defamation were without factual basis at the time the complaint was filed and throughout the pendency of this action. Since publication was an essential element of the claim, and the District Court found a complete lack of proof of publication, this type of bad faith conduct warrants sanctions. Therefore, sanctions are authorized for the reasons enunciated in *Rhinehart* and *Kinee*.

Petitioner's argument that sanctions could not be imposed under the amended version of Rule 11 does not withstand careful scrutiny since Petitioner had a continuing duty to ensure that all subsequent filings reflected all of the facts known at the time of the filing. Thus, Petitioner could be sanctioned under

amended Rule 11 after its effective date since he continued to file documents with the court without amending the baseless claims made known to Petitioner early in the case. Courts impose a continuing obligation on parties to ensure that all claims advanced in a lawsuit have arguable merit and are not brought frivolously. As the Fifth Circuit opined in *Robinson v. National Cash Register Co.,* 808 F.2d 1119 (5th Cir. 1987), "[A]ttorneys must realize that the inquiry required by [R]ule 11 is not a one time only obligation, ***counsel have a continuing obligation to review and reevaluate their position as the case develops."*** *Id.* at 1127 (emphasis supplied). *See also Pantry Queen Foods v. Lifschultz Fast Freight,* 809 F.2d 451 at 454 (7th Cir. 1987) (implicit obligation to update under amended Rule 11).

In *Elster v. Alexander,* 122 F.R.D. 593 (N.D. Ga. 1988) amended Rule 11 sanctions were imposed on plaintiff's attorney for all filings occurring after the effective date of the amendment. Rejecting counsel's argument that sanctions could not be imposed because the filing occurred prior to the amendment to Rule 11, the trial court cited this Court's Order promulgating the amendment, stating the amendment "shall take effect on August 1, 1983 and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending." *Id.* at 600. The district court found that while the original pleading was filed 8 years prior to the effective date of amended Rule 11, all filings by plaintiff's attorney occurring in the 5 years after the amendment to Rule 11 were sanctionable under the amended Rule. Additionally, the court imposed sanctions for the conduct in the prior eight years under its inherent power to sanction and under Section 1927. *Id.* at 604, 605.

Likewise, in the instant case, the District Court imposed sanctions on Petitioner for filings which occurred prior to the amendment of Rule 11.

For the reasons stated above Respondent submits that Petitioner's failure to raise his issues in a timely manner before this Court should result in denying the Petition for Writ of Certiorari. While this Court has stated it will consider issues not passed on by a lower court only where "injustice might otherwise result," *Hormel v. Helvering, supra,* Petitioner has failed to adduce sufficient arguments to establish that an injustice is present in the case at bar. The District Court's Order did not result in an injustice, indeed, the District Court had a right to impose sanctions in the form of attorney's fees against Petitioner's original filing and subsequent actions based on its inherent authority, and statutory authority including 28 U.S.C. § 1927, as well as the pre-amended and amended versions of Rule 11. Respondent therefore asserts that the District Court's award of attorney's fees can be upheld on any of these grounds and the Petition for Writ of Certiorari should be denied.

The United States Court of Appeals for the Eleventh Circuit Has Not Rendered A Decision in Conflict With the Second and Seventh Circuit Courts of Appeals.

Contrary to Petitioner's assertions, the Eleventh Circuit's decision in the instant case is not at odds with prior decisions or with decisions rendered in the Second and Seventh Circuits. The Eleventh Circuit's decision is consistent with this Court's Order promulgating the amendment to Rule 11 and is clearly distinguishable from the cases cited by Petitioner. *Hashemi v. Campaigner Publications, Inc.,* 784 F.2d 1581 (11th Cir. 1986); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight,* 809 F.2d 451 (7th Cir. 1987); and *Oliveri v. Thompson,* 803 F.2d 1265 (2nd Cir. 1986), *cert. denied,* __ U.S. __, 107 S.Ct. 1373 (1987).

This Court's Order promulgating the 1983 amendment to Rule 11 states that the amendments

"shall take effect on August 1, 1983 and shall govern all civil proceedings thereafter commenced and, *insofar as just and practicable, in proceedings then pending.*" 97 F.R.D. 165 (1983) (emphasis added). The plain language of this Court's Order establishes that the amended version of Rule 11 can be applied to cases pending when the amendment took effect. Petitioner attempts to rely on the Eleventh Circuit's ruling in *Hashemi Campaigner Publications, Inc., supra,* where the court affirmed the district court's refusal to retroactively impose sanctions pursuant to amended Rule 11 in a case dismissed before the amendment became effective.

Of crucial importance in the case at bar is recognition that in *Hashemi,* the litigation was filed and concluded before the 1983 amendments to Rule 11 became effective. No portion of the case was still pending at the time the August 1, 1983 amendment took effect. On that basis, the Eleventh Circuit refused to apply amended Rule 11. In contrast, in the instant case, the overwhelming majority of this action was litigated for five years following the effective date and accordingly, it is abundantly clear that the instant case is distinguishable from *Hashemi* and, as such, the *Hashemi* holding is inapplicable.

Petitioner also attempts to rely on the decision in *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, supra,* arguing that amended Rule 11 did not apply and there was no obligation to update papers that were not subject to sanctions when filed. The factors distinguishing *Pantry Queen* from the instant case are significant. Without articulating any rationale for its actions, the district court, in *Pantry Queen,* imposed sanctions in the nature of attorney's fees against plaintiff's counsel. Because of the district court's failure to explicitly state any basis for sanctions, the Seventh Circuit analyzed the applicability of Rule 11, a litany of other statutory, and equitable grounds,

upon which the district court may have relied. After reviewing the facts, the Seventh Circuit concluded Rule 11 sanctions were not warranted and did not limit a district court's ability to apply the Rule to a case pending at the time the amended Rule 11 became effective. On that issue, the court concluded that the plaintiff's subsequent amendments to its original filing, "[C]orrects any factual mistake in the answer to the complaint and takes Rule 11 out of this case." *Id.* at 455.

Petitioner's further attempts to rely on *Pantry Queen* as holding that amended Rule 11 does not impose on parties a continuing obligation to update papers is inapposite to the opinion of the court. The Seventh Circuit actually held that "there is an implicit obligation to update because Rule 11 applies to all papers filed in the litigation. Each filing must reflect the results of reasonable inquiry." *Id.* at 454. The *Pantry Queen* court did not impose amended Rule 11 sanctions because subsequent filings corrected factual mistakes appearing in the original pre-amendment filing. *Id.* at 455. In the case at bar Petitioner's Complaint, filed prior to the Rule 11 amendment, was sanctionable under pre-amendment Rule 11 and other statutory authority, as well as the inherent authority of the District Court. Petitioner's continued prosecution of meritless claims in the trial court subsequent to the amendment to Rule 11 is inconsistent with the holding in *Pantry Queen. See also, Elster v. Alexander, supra.* Accordingly, the Seventh Circuit's holding in *Pantry Queen* does not support Petitioner's argument, and is not in conflict with the Eleventh Circuit.

The Second Circuit's decision in *Oliveri v. Thompson, supra,* is as readily distinguishable as *Hashemi* and *Pantry Queen.* In *Oliveri,* the case on appeal had nothing to do with retroactive application of amended Rule 11. Actually, the district court

found no violation of pre-amendment or post-amendment Rule 11 in the plaintiff's initial complaint, and only imposed limited Rule 11 sanctions for subsequent actions taken by plaintiff's attorney. Reviewing the facts of the case, the Second Circuit found these limited sanctions were inappropriate. *Oliveri* at 1276, 1279. Petitioner nevertheless attempts to portray *Oliveri* as applicable to the instant case and cites dicta out of context. Petitioner's distorted portrayal fails to recognize that all of his subsequent filings were governed by amended Rule 11. As the Seventh Circuit in ***Pantry Queen*** explicitly stated, "a court has ample support for sanctions when new filings do not reflect the full picture." ***Pantry Queen*** at 454.

As the District Court observed during discovery, Respondent repeatedly advised Petitioner that his claims were baseless. (Pet. App. 2). The District Court recognized that Petitioner knew or should have known of the frivolousness of his claims. On the basis of such finding, the court correctly applied amended Rule 11 and imposed sanctions against Petitioner. Petitioner's egregious conduct in pursuing the frivolous claims was also sanctionable under statutory authority and the inherent authority of the court. Accordingly, the Eleventh Circuit's affirmance of the District Court's imposition of amended Rule 11 sanctions is correct and is not at odds with the decisions of the Second and Seventh Circuits. The District Court had numerous grounds upon which to base sanctions against Petitioner and the imposition of sanctions based on amended Rule 11 was proper. More importantly, in his initial appeal to the Eleventh Circuit, Petitioner failed to challenge the District Court's authority to apply the amended rule in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied and additional sanctions imposed on Petitioner.

Respectfully submitted,

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